

EX PARTE OR LATE FILED

MCINTYRE LAW FIRM, PLLC

ATTORNEYS AND COUNSELORS AT LAW

MADISON OFFICE BUILDING

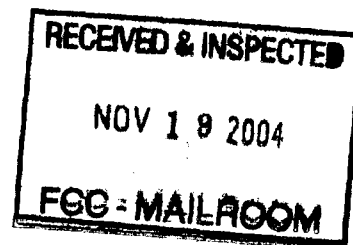
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ORIGINAL

EX PARTE

November 15, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation and Filing
CG Docket No. 02-278

Dear Ms. Dortch:

Jim Pickard of Mass Marketing Insurance Group; Thomas Munoz of National City Insurance Group; David Giedzinski and Charlie Acosta of National Union Fire Insurance Company of Pittsburgh, PA, and I met on November 3, 2004 with K. Dane Snowden, Jay C. Keithley, Erica McMahon, and Gene Fullano of the Consumer and Governmental Affairs Bureau regarding the referenced matter.

During the meeting, which lasted for one hour, we discussed the extent to which an "established business relationship" that exists between a seller, specifically a bank, and an individual whose telephone number is on the national Do Not Call List may be used by an affiliate of the bank to call the individual to market insurance products to the individual. We explained how banks market insurance products and how bank marketing operations and customer relationships are uniquely affected by the scope of the established business relationship exception.

Attached is a copy of a follow-up letter sent earlier today to Messrs. Snowden, Keithley, and Fullano, and Ms. McMahon, as well as to Christopher Libertelli, Matthew Brill, and Daniel Gonzalez in the Commissioners' offices.

PLEASE NOTE THAT WE ATTEMPTED TO FILE THIS MATERIAL ELECTRONICALLY, BUT WERE ADVISED THAT THE PROCEEDING IS CLOSED.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chrys D. Lemon".

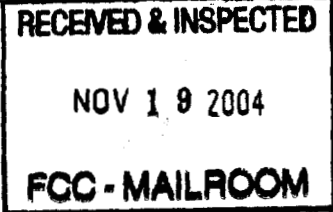
Chrys D. Lemon

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EX PARTE


November 12, 2004

Via e-mail

MEMORANDUM

TO: K. Dane Snowden (also via courier)

CC: Matthew Brill (Commissioner Abernathy's office)
Genaro Fullano
Daniel Gonzalez (Commissioner Martin's office)
Jay C. Keithley
Christopher Libertelli (Chairman Powell's office)
Erica McMahon

FROM: Chrys D. Lemon 

RE: **Response to Your Request for Additional Information -- Availability of the Established Business Relationship Exception to the National Do-Not-Call Prohibition for Affiliate Marketing of Insurance Products Provided by an Unaffiliated Insurance Company**

On Wednesday, November 3, representatives of Mass Marketing Insurance Group (" MMIG "), National Union Fire Insurance Company of Pittsburgh, Pa. (" NUFIC "), and I met with you and your staff concerning a Petition for Reconsideration filed by MMIG and NUFIC related to the Commission's Telemarketing Rule (" Rule "). At issue during that meeting was the petitioners' request, as stated in their Petition, for the following clarification of the Rule: That a bank's established business relationship (" EBR ") with a customer extends to an *affiliated* insurance agency for the purpose of marketing insurance products underwritten by an *unaffiliated* insurance company.

During the meeting, you asked us to provide you with proposed language and supporting rationale related to the requested clarification that would address staff concerns that the clarification be rationally based and not focused on one industry group (the bank-insurance sector). Specifically, your staff asked whether the clarification should apply only to the bank-insurance industry, or whether it should apply as well to the securities industry and other industry sectors.

We have developed proposed language and supporting rationale that addresses these concerns. By grounding the proposed language in the 1999 Gramm-Leach-Bliley Act (" GLBA ") – a law that fosters affiliate marketing of financial products and services through crossmarketing activities – the proposed clarification carves out financial services affiliates from other types of affiliates, and does so in a rational way.

Proposed Language:

A company's established business relationship ("EBR") with a customer extends to an affiliate, as that term is defined in Section 2(k) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841(k)), for the purpose of the affiliate marketing products or services provided by an unaffiliated third party, as long as all of the following conditions are satisfied:

- 1. The company having the EBR with the customer is a "financial institution," as that term is defined in Section 509(3)(A) of the GLBA (15 U.S.C. § 6809(3)(A)), and must, therefore, comply with the notice requirements related to information sharing among affiliates set forth in Title V of the GLBA (15 U.S.C. §§ 6801 et seq.).*
- 2. The offering of the products or services by the affiliate is deemed to be an "activity that is financial in nature," as that term is defined in Section 4(k)(4) of the Bank Holding Company Act of 1956, as added by Section 103(a) of the GLBA (12 U.S.C. § 1843(k)(4)).*
- 3. The affiliate is required to comply with the restrictions on the use of customer information received from the company, and related notice requirements, set forth in Section 624 of the Fair Credit Reporting Act, as amended (15 U.S.C. § 1681s-3), and any implementing regulations.*
- 4. The affiliate is required to be licensed or otherwise registered with a Federal or state regulator to offer the product or service (e.g., holding an insurance agent's license or a securities broker-dealer license).*
- 5. The affiliate is required by Federal or state law to be expressly authorized by the unaffiliated third party to offer its products or services, such as through an insurance company's appointment of an insurance agency.*
- 6. The traditional manner in which the unaffiliated third party's products or services have been marketed is through a designated agent or representative, such as an insurance agent or a securities broker-dealer.*

Rationale:

1. **Tying the requested clarification to the GLBA, through its amendments to the Bank Holding Company Act of 1956, grounds the clarification in a specific, targeted Federal authorization – for financial services affiliates to engage in the broad crossmarketing of “financial products and services,” thereby limiting the scope of the clarification in a rational way.** The GLBA permits the crossmarketing of financial products and services among various types of financial services providers: national banks, state-chartered banks, savings associations, credit unions, insurance companies, insurance agencies, and securities firms. The Act does so by permitting those entities to engage in “activities that are financial in nature.” (12 U.S.C. § 1843(k)(4)). Listed activities include:

- *Advisory Activities* – Specifically, “providing financial, investment, or economic advisory services, including advising an investment company (as defined in Section 3 of the Investment Company Act of 1940).”
- *Securities Activities* – Specifically, “underwriting, dealing in, or making a market in securities.”
- *Insurance Activities (acting as principal or agent)* – Specifically, “insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purpose of the foregoing, in any State.”

The job of an insurance agent (or agency, in the corporate sense) is to offer insurance products. As such, an insurance agent engages solely in an “*activity* that is financial in nature” – offering financial *products* on behalf of an insurance company. While banks are authorized to sell all lines of insurance through either an insurance agency affiliate of a qualifying bank holding company¹ or an insurance agency that is a financial subsidiary of a bank,² the GLBA does not require that the insurance agency affiliate’s activities be limited to offering products that are underwritten by a bank-affiliated insurance company.

Congress’s stated intention in expanding and clarifying the scope of bank authority in 1999 was to foster the crossmarketing of financial products and services for the purpose of providing consumers with one-stop shopping for all types of financial products and services. A customer whose telephone number is listed on the national do-not-call list, and who receives a telemarketing call from a bank’s affiliate to market financial products or services – even those provided by an unaffiliated third party – should not be surprised to receive a telemarketing call. *Accordingly, the clarification would not detract from the policy of limiting the scope of the EBR, yet it would support the GLBA’s policy of permitting crossmarketing of financial products*

¹ 12 U.S.C. § 1843(k).

² 12 U.S.C. § 24a (national bank financial subsidiary); 12 U.S.C. § 1831w (state-chartered bank financial subsidiary).

and services through various financial services affiliations. Moreover, the GLBA link would limit the industries that are able to rely on the clarification to those involved in the financial services marketplace, avoiding the “Mack Truck” (“Parade of Horribles”) problem that could be caused by unwarranted expansion of the EBR. For example, the offering of membership services does not appear to fall within the definition of an “activity that is financial in nature.”

2. **Linking the clarification to the GLBA, and bringing in the requirement that the affiliate be licensed to offer the product or service, should help ensure that those involved in telemarketing consider any legal requirements in offering the products and services.** As an example, banks are required to have certain policies in place to offer insurance products and securities, specifically, having a contract with the affiliate that includes certain provisions that address bank “safety and soundness” concerns and protect consumers.
3. **In addition to being notified at the onset of a telemarketing call concerning the company-affiliate relationship, customers receiving calls from affiliates that would be affected by the clarification normally will have had prior notice that the affiliate may receive, and use for marketing purposes, information obtained from the company’s relationship with the customer.** Title V of the GLBA (15 U.S.C. § 6801 *et seq.*) requires a “financial institution” to provide a privacy notice to a new customer at the time it establishes a customer relationship, and to provide annual privacy notices thereafter. The term “financial institution” is defined as an “institution the business of which is engaging in [activities that are financial in nature].” (15 U.S.C. § 6809(3)(A)). Privacy notices must advise the customer about the categories of protected customer information (referred to as “nonpublic personal information”) it intends to disclose to its affiliates. (15 U.S.C. § 6803(a)(1)). Attached is a sample bank privacy statement containing the required notices related to information sharing. It provides that “[The Bank] Corporation, its family of financial services companies (‘affiliates’) and employees, are dedicated to protecting the privacy of your nonpublic personal information. We maintain information about you in order to provide you with the most effective and convenient access to our broad range of financial products and services.” Additionally, the privacy notice contains the following statement regarding affiliates’ use of customer information, as required by the Fair Credit Reporting Act (15 U.S.C. §§ 1681 *et seq.*): “We share information about you with our affiliates.”
4. **The clarification would recognize the unique manner in which certain products, such as insurance and securities, are normally marketed – through an agent or other representative of the principal.** Consumers are comfortable with these types of financial services marketing arrangements; consequently, they likely would “reasonably expect”³ to receive telemarketing calls from an affiliate.

³ 47 C.F.R. § 64.1200(f)(3)(ii).

5. **Finally, the clarification would level the playing field for small banks desiring to offer insurance products to their customers.** Only the largest banks are able to affiliate with an insurance company, and a company's EBR clearly extends to an affiliated insurance company. In comparison, small banks normally are only affiliated with an insurance agency that sells products offered by an *unaffiliated* insurance company.

In conclusion, the petitioners' proposed language:

(1) would place both large and small banks on the same plane for the purpose of telemarketing by affiliates;

(2) would be consistent with the GLBA's policy of enabling crossmarketing among financial services affiliates; and

(3) would do so in a narrow, rationally-based manner.

If you need additional information, please contact me at (202) 659-3900 (or via e-mail at clemon@mcintyrelf.com).

[Excerpts from Sample Gramm-Leach-Bliley Privacy Statement]

OPT-OUT: *We will not share your nonpublic personal information with others as defined below. [The Bank], on your behalf, has exercised your right to opt-out under 12 CFR Part 40, Privacy of Consumer Financial Information.*

The basis of each customer relationship at [The Bank] is built on trust. You have chosen to do business with [The Bank], and we guard that relationship with great care, beginning with the information you have chosen to share with us. **That is why we have opted out for you as a matter of corporate policy. [The Bank] does not share information about you outside of our [The Bank] companies unless permitted by Title V of the Gramm-Leach-Bliley Act of 1999 ("GLBA") and other applicable laws and regulations.**

[The Bank] Corporation, its family of financial services companies ("affiliates") and employees, are dedicated to protecting the privacy of your nonpublic personal information. We maintain information about you in order to provide you with the most effective and convenient access to our broad range of financial products and services. We want you to understand what information we collect, and how we use and protect it. This notice serves as a standard for all [The Bank] employees for collection, use, retention and security of nonpublic personal consumer information.

What Information We Collect

"Nonpublic personal information" is information about you that we obtain in connection with providing a financial product or service. Such information includes for example, account balance, income, assets, insurance premiums, payment history and overdraft history.

We may collect nonpublic personal information about you from the following sources:

- Information that you provide to us, such as on applications or other forms
- Information about your transactions with us, our affiliates or others, or
- Information from others, such as credit bureaus, real estate appraisers, and employers

Our Security Procedures

To maintain security of customer information, we restrict access to your personal and account information to persons who need to know that information to provide you products or services. We maintain physical, electronic and procedural safeguards to guard information.

What Information We Disclose

[The Bank] does not disclose nonpublic personal information about you to any companies that are not members of our corporate family ("third parties"), except as permitted by federal law, specifically Title V of the GLBA of 1999. The confidentiality of your nonpublic personal information will continue to be maintained consistent with this privacy notice even if you decide to close your account(s), your account becomes inactive, or when you otherwise cease to do business with us.

[The Bank] works with a variety of third parties to bring you financial services. We disclose information about you as necessary to fulfill these third party service agreements. For example, we may disclose information about you to third parties that assist us in servicing or maintaining your loan or deposit account, or other business relationship, such as printing checks or billing you for loan payments. We may also disclose information about you to governmental entities, such as sending annual income statements to the IRS, and to other third parties such as credit bureaus, or in response to subpoenas.

We may disclose all of the information we collect, as described above, to third parties that perform marketing services on our behalf or to other financial institutions, such as insurance providers, with whom we have joint marketing agreements in order to make a variety of financial services available to you. These third parties must agree to strict confidentiality provisions to assure the protection of your information. Because we already limit the sharing of your nonpublic personal information as outlined above, no action is necessary on your part to limit such sharing.

Fair Credit Reporting Act Disclosure

We share information about you with our affiliates. Under the Fair Credit Reporting Act you may direct us not to share certain credit information with our affiliates. Examples of the kind of credit information that you may direct us not to share include the nonpublic personal information you provide in your application or that we obtain about you from nonaffiliated third parties such as credit bureaus. If you don't want such information shared you may write to us at [The Bank] Corporation, Attention: [Privacy Officer]. Please provide your name, address, social security number and account number(s). **(NOTE: If you have previously requested that we restrict such sharing you do not need to make another request.)** Your request not to share credit information does not include information we are permitted to share by law, such as information related solely to our experiences or transactions with you. Your account balance and payment history are examples of transaction and experience information that we are always permitted to share with our affiliates.

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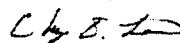
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